

II. Factual Background

In November of 2008, Dr. Clay submitted his twenty-two page report in this case. His report sets forth a wide variety of purported expert opinions, which are summarized on pages four and five of his report. *See* Ex. 1, pp. 4-5. His opinions address varied topics, including the volume of poultry and cattle production in the IRW, land application of animal manure in the IRW, amounts of animal waste in the IRW, and bacteria in manure. The key underpinnings of his opinions are the numbers of poultry and cattle in the IRW and the waste they produce.

Dr. Clay is a veterinarian whose work has focused on the development of pharmaceutical products for animals. Dr. Clay stated in his deposition that he is not an agricultural engineer or an agricultural economist. *See* Ex. 2, p. 374:10-13. Dr. Clay has not published materials on the topics he opines about in this case. Instead, his writing experience is limited to numerous proprietary articles and reports authored for pharmaceutical companies. *See* Ex. 2 at 3:24-25:09; 58:22-59:10; 27:9-11; Ex. 1, p. 39.

Dr. Clay's Lack of Expertise

Dr. Clay's proffered opinions are beyond the limits of his training and experience. For example, for his opinions regarding animal populations in the IRW, Dr. Clay relied exclusively on an agricultural economist (who was not identified in his report) to perform critical calculations and retrieve data pertinent to his opinions. When asked during his deposition for reliable scientific authorities to support his opinions that were based on Dr. Jobes' work, Dr. Clay was unable to provide them and could only refer generally to the work performed by Dr. Jobes. *See* Ex. 2 pp. 83:21-84:7; 87:9-13; 87:23-88:4; 119:4-9; 123:10-15; 248:24-249:6; 251:11-14; 268:7-17; 296:22-297:2; 298:22-299:2; 313:21-314:1; 320:12-16; 327:11-18; 328:2-14; 329:16-330:4; 330:25-331:3; 346:14-17; 350:1-4; 351:9-10; 354:10-21; 371:25-374:17;

394:7-23. In fact, Dr. Clay admitted that the scientific “authority” for some of his work was simply “Dr. Jobes” without citation to any peer reviewed, published work. *See* Ex. 2, p. 319:13-320:2. During his deposition, Dr. Clay was unable to replicate a simple division calculation to arrive at a percentage that was performed by Dr. Jobes. *See* Ex. 2, p. 392:14-393:19. Dr. Jobes was responsible for much of the work that Dr. Clay relies upon, and he prepared most or all of the appendices to the report. *See* Ex. 2, p. 315:15-20. However, Dr. Jobes has not been disclosed as a testifying expert in this case and Defendants are attempting to bring his opinions into this case through Dr. Clay who is not qualified to present them.

Another area in which Dr. Clay reaches beyond his expertise is when he opines that the State has not produced evidence that “cattle producers in the IRW have violated the laws and regulations pertaining to the application of poultry litter,” while he also admits that he has not thoroughly investigated the truth of that statement. *See* Ex. 1, p. 5. Summary of Opinions #16; Ex. 2, pp. 423:23-424:9; 429:4-6; 431:24-432:8; 432:15-433:3; 444:19-445:3; 445:17-446:4; 446:17-447:1.

Dr. Clay also stated in his deposition that he does not have qualifications to opine about mass balance studies, yet Dr. Clay expresses criticism regarding the mass balance prepared and reported by Dr. Engel and Meagan Smith. Dr. Clay stated he has never performed a mass balance and has never received specific education or training in its use. *See* Ex. 1, p. 15; Ex. 2, 386:19-387:4. Dr. Clay also admits he has no knowledge of any of the Defendants’ experts having performed a mass balance for any or all of the IRW. *See* Ex. 2, p. 387:5-8.

Dr. Clay’s Unreliable Poultry and Cattle Numbers

Dr. Clay’s opinions regarding waste generated in the IRW by poultry and cattle required an estimate of the number of poultry and cattle in the IRW. *See* Ex. 2 , pp. 118:4-119:9; 126:7-

17. Dr. Clay used inconsistent methodology to arrive at the numbers that purport to support his opinions. Dr. Clay (through the work of Dr. Jobes) “counted” poultry (broilers & turkeys) in the IRW by using government agricultural census *sales* data but ignored *inventory* data. Then, switching methodologies midstream, he did *just the opposite* for his cattle number calculations. For cattle numbers, Dr. Clay used 2002 Agriculture Census *inventory* data and ignored *sales* data. See Ex. 1, Appendix A, Table A-A & Appendix C, Appendix D, Tables DA-1 DA-2 DA-3; Ex. 2, 118:15-25; 119:14-16; 123: 16-22; 124:14-19; 324:6-10; 345:113-19; 347:20-348:7; 394:24-395:8. Dr. Clay admitted in his deposition that cattle might be bought and sold during the year, but he did not use the reliable 2002 Agriculture Census to provide the most accurate data. Instead, he created a formula for which there is no scientifically accepted authority. See Ex. 2, 335:3-22; 336:17-337-24. Dr. Clay even acknowledged in his deposition that the Agricultural Census has the data available but that he chose not to use it. See Ex. 2, 345:13-:346:2; 346:3-8.

Dr. Clay also ignored the definitions and instructions formulated by the U. S. Agricultural Census data by increasing *by thirty percent* the cattle population animal units, which in turn inflated his cattle number and cattle waste volume calculations. Dr. Clay counted bulls and heifers more than once to change his animal unit for cattle from 1 to 1.3, while admitting those animals are already accounted for in the census data. See Ex. 2, 333:14-337:24. Dr. Clay essentially manufactured data for cattle numbers while ignoring scientifically acceptable census data that was available. This caused him to increase the amount of waste produced by cattle above that which is cited in the USDA Agricultural Waste Management Handbook (hereinafter “Agricultural Handbook). See Ex. 2, p. 82:1-7. Dr. Clay’s only authority to support this novel, untested computation was Dr. Jobes, an agricultural economist whose qualifications are

unknown and who will not be testifying in the case. *See* Ex. 2, 83:21-84:2.

Dr. Clay's methodology for counting poultry relied on zip code data to quantify the number of birds produced in the IRW. *See* Ex. 2, pp. 124:14-19; 327:6-10. Dr. Clay testified that he knew that the zip code data does not report all farms within a zip code due to confidentiality requirements of the census. *See* Ex. 2, pp. 328:20-23; Ex. 1, Appendix B, Tables BA & BO. Dr. Clay admitted in his deposition that using this methodology to determine the number of birds produced in the IRW resulted in significant inaccuracy -- for example, of undercounting broilers by over 6 million and turkeys by 2.2 million *in a single zip code area*. *See* Ex. 2, 332:14-333:5; 338:6-340:17; Ex 5, Clay Deposition Exhibit #50. Dr. Clay, aware that he was under reporting the amount of birds nonetheless did not even contact Defendants for accurate bird count data. *See* Ex. 2, pp. 330:25-331:7. Simply put, Dr. Clay's methodology was dependent on the total number of birds, yet he failed to use a reliable method for determining the correct numbers. *See* Ex. 2, pp. 361:24-362:2

Dr. Clay also admitted in his deposition that he erroneously used 2002 annual data for his poultry waste calculations, but purposely reduced that total by other data from 2007. *See* Ex. 2, pp. 288:16-289:8. Additionally Dr. Clay used an average weight for broilers that was less than that reported by Defendants in documents produced in this case and by several growers in their depositions, all of whom reported average bird weights in excess of the amount used by Dr. Clay. Finally, Dr. Clay made no inquiry of Defendants to validate actual average bird weights for such calculations. *See* Ex. 2, 320:7-10; 326:9-19. In addition, Dr. Clay rounded down the average number of broiler flocks grown per year which lowered the poultry waste contribution. *See* Ex. 2, pp. 348:25-349:10.

Dr. Clay's Unreliable Bases for Waste Calculations

Dr. Clay ignores reliable data available to him in recognized, authoritative materials regarding poultry manure and waste characteristics, and instead performs a complicated calculation to further “dry” the poultry waste, thus reducing its weight and the amount of poultry waste contribution to the IRW. *See* Ex. 2, 371:19-372:2; Ex. 1 at Appendix A Table A-A. Notably, Dr. Clay did not actually perform the “drying” calculation himself, but rather Dr. Jobes does this calculation without reference to any scientific data or authority. *See* Ex. 2, 371:19-373:13. Dr. Clay did nothing to verify what, if any, authority Dr. Jobes may have relied on to construct his calculation, thus eliminating the ability to validate or test this undocumented methodology. *See* Ex. 2, 372:22-373:13. In describing the drying process, Dr. Clay uses the term “fermentation” which implies it is a recognized process. *See e.g.* Ex. 1, p. 13. However, Dr. Clay stated in his deposition that he did nothing to establish that “fermentation” occurs in the poultry barn. When asked whether “fermentation” is a term identified in any studies in his considered materials or in the Agricultural Handbook he says “no.” *See* Ex. 2, 260:7-15; 263:2-5; 270:23-271:3; 354:3-21. Dr. Clay agreed this “fermenting” or drying process that he attempted to calculate is already accounted for in the reliable data available in the Agricultural Handbook. However, rather than using the data available from the Agricultural Handbook, Dr. Clay chose to use his own, untested, unreliable “fermentation” methodology to address the manner in which poultry waste dries. *See* Ex. 2, pp. 355:18-356:9, 359. Dr. Clay admits he created the drying or “fermentation” calculation, that the calculation is not the same as that reported in the Agricultural Handbook, and that it results in a lower number than the Agricultural Handbook data. *See* Ex. 2, 356:22-25; 357:1-14; 358:7-15; 358:22-359:6.

In addition, Dr. Clay stated, both in deposition and at the Preliminary Injunction hearing,

that comparing waste of poultry and beef cattle must be done on either a “dry versus dry” or “wet versus wet” basis. *See* Ex. 2, 378:3-12. However, in his report, Dr. Clay ignores this principle, failing to use comparable values for the amount of cattle waste produced in the IRW and to decrease the amount of poultry waste produced in the IRW. *See* Ex. 2, pp. 358:7-15; 359:9-13; Ex. 1, p. 13, p. 17, Appendix A, Table A-A; Appendix G.

III. Legal Standard

Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, "Fed. R. Evid. 702 imposes on the trial judge an important 'gate-keeping' function with regard to the admissibility of expert opinions." *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001). As an initial matter, the court must determine the expert is qualified by "knowledge, skill, experience, training, or education" to render an opinion. *Id.* “It should be borne in mind that the issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.” *In re Williams Securities Litigation*, 496 F. Supp. 2d 1195, 1232 (N.D. Okla. 2007)(internal quotations omitted). An expert’s qualifications must be both adequate in a general, qualitative sense and specific to the matters he proposes to address as an expert. *See id.*

As explained in *In re Williams Securities Litigation*, 496 F. Supp. 2d at 1195:

[I]t should be borne in mind that "[t]he issue with regard to expert testimony is

not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 902, 130 L. Ed. 2d 786 (1995). *See also*, *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) ("To begin with, we agree with the district court that Dr. Curtis . . . easily qualifies as an expert under Federal Rule of Evidence 702. The real question is, what is he an expert about?") and *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 571 (2003), *rev'd in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005). Thus, on the issue of expert qualifications, *Ralston* and like cases establish that the qualifications of the proposed expert are to be assessed only after the specific matters he proposes to address have been identified. The controlling Tenth Circuit cases, exemplified by *Ralston*, establish that the expert's qualifications must be both (i) adequate in a general, qualitative sense (i.e., "knowledge, skill, experience, training or education" as required by Rule 702) and (ii) specific to the matters he proposes to address as an expert.

Next, the court must ensure that the scientific testimony being offered is "not only relevant, but reliable." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).¹ "To be reliable under *Daubert*, an expert's scientific testimony must be based on scientific knowledge" *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003). The Supreme Court has explained that the term "scientific" "implies a grounding in the methods and procedures of science." *Daubert*, 509 U.S. at 590. Likewise, it has explained that the term "knowledge" "connotes more than subjective belief or unsupported speculation." *Id.* Thus, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- i.e., 'good grounds,' based on what is known." *Id.*

The Supreme Court has set forth four non-exclusive factors that a court may consider in making its reliability determination: (1) whether the theory or technique can be (and has been)

¹ The Supreme Court held in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that the gatekeeping function set out in *Daubert* applies not only to expert testimony based on scientific knowledge, but also expert testimony based upon technical or other specialized knowledge -- i.e., it applies to all expert testimony.

tested, *id.* at 593; (2) whether the theory or technique has been subjected to peer review and publication, *id.*; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation, *id.* at 594; and (4) whether the theory or technique has general acceptance in the scientific community, *id.* The inquiry is "a flexible one." *Id.*; see also *id.* at 593 ("[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test"); *Dodge*, 328 F.3d at 1222 ("the list is not exclusive"). "The focus [of the inquiry]. . . must be solely on principles and methodologies, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

To be relevant, the testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. This consideration has been described as one of "fit." See *Daubert*, 509 U.S. at 591. "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id.*

In sum, "[t]he objective of [the gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Finally, the party proffering the expert scientific testimony bears the burden of establishing admissibility under the Federal Rules of Evidence and *Daubert*. See *Ralston*, 275 F.3d at 970 fn. 4.

IV. Argument

A. Dr. Clay Lacks the Expertise Needed to Opine on the Matters in his Report

Dr. Clay's report relies upon calculations of the numbers of poultry and cattle in the

watershed, and upon waste calculations derived from the population numbers. In addition to the fact that the methods used to calculate those numbers are unreliable, as demonstrated *infra*, Dr. Clay does not have the necessary specific qualifications to opine on these matters. As explained *supra*, Dr. Clay had to rely upon an agricultural economist to collect the data and perform the calculations and analysis that form the basis for his opinions. Perhaps Defendants should have disclosed that agricultural economist, Dr. Jobes, as their testifying expert in this case, but they did not. Instead, Defendants are attempting to offer a veterinarian, whose work has focused on pharmaceutical developments, to opine on matters well beyond his expertise. As demonstrated by the materials considered by Dr. Clay, the authors of recognized published literature in the scientific community on animal waste characteristics are agricultural engineers, not veterinarians. *See e.g.* Ex. 3, *Agricultural Waste Management Field Handbook*, Chapter 4. US Department of Agriculture Soil Conservation Service. 210-AWMFH, 4/92 (Clay000135); Ex. 4, *American Society of Agricultural and Biological Engineers Standards for Manure Production and Characteristics* (Clay000716). Because Dr. Clay lacks the expertise to opine on these matters, and these matters are the underlying basis for all of his opinions, Dr. Clay's opinions should be excluded in their entirety. In addition, Dr. Clay's opinions critiquing mass balance studies, as well as whether cattle producers have violated the law, are clearly beyond his areas of expertise and experience, as he admitted in his deposition. Thus, these opinions must also be excluded. *See supra*, p. 3.

B. The Cattle and Poultry Numbers Relied Upon by Dr. Clay are Unreliable, Thereby Rendering Opinions Based Upon these Numbers Unreliable

Even if the Court were to determine that Dr. Clay was somehow qualified to opine on the matters in his report, his opinions regarding the numbers of cattle and poultry in the IRW, and

the amounts of waste these animals generate are unreliable. Dr. Clay's inconsistent approach for counting poultry and cattle, which mixed inventory and sales numbers, ignored scientifically consistent data and demonstrates a bias in his analysis. *See supra*, pp. 4-5. Dr. Clay admitted in his deposition that he did not use data from the census on cattle sold even though it exists. *See* Ex. 2, 345:113-19. Dr. Clay also admitted that there were gross underestimates in his (or Dr. Jobes') poultry calculations. *See e.g.* Ex. 2 pp. 330-333 (Dr. Clay admitting that his count of turkeys underestimated the accurate number 2.8 million *by 2.2 million*, using the inaccurate and unreliable count of 669,000 instead). As discussed above, Dr. Clay also underestimated the average weight of birds, which caused him to again underestimate the amount of waste being generated. The biased analysis employed by Dr. Clay caused him to inaccurately and unreliably increase the amount of waste generated by cattle and decrease the amount of waste generated by poultry. In short, Dr. Clay knowingly used methodologies that would not capture the accurate data. To make matters worse, Dr. Clay did nothing to remedy his unreliable data, despite the fact he could have obtained better data from Defendants, who retained him to opine on these issues. This flawed methodology intentionally resulted in a minimized, inaccurate and unreliable estimate of the amount of poultry waste generated in the IRW. In addition, nothing was done to calculate any margin of error in the estimates made. *See* Ex. 2, 329:25-330:4. Thus, because his methodologies used inaccurate data, and were performed in an unreliable manner, Dr. Clay's opinions must be excluded in their entirety.

C. Dr. Clay's Method to Account for the Drying of Poultry Waste is Is Not Supported by Science and is thus Unreliable

In forming his opinions regarding poultry waste in the IRW, Dr. Clay used a theory he calls "fermentation" to account for the drying of poultry waste. The result of Dr. Clay applying

his “fermentation” calculation is that it lowers the amount of poultry waste in comparison to cattle waste. Dr. Clay’s “fermentation” calculation is a methodology that has not been tested or subjected to peer review, and it was performed by an individual who will not be testifying in this case. In addition, the drying of poultry waste is *already* accounted for in reliable, authoritative materials on this topic, which were available to Dr. Clay. Yet, instead of using that reliable source of information, he applied his novel “fermentation” method to the data, a method that has not been peer-reviewed, tested, or accepted in the field. Thus, it is an unreliable basis for Dr. Clay’s opinions and his opinions must be excluded.

V. Conclusion

Dr. Clay ignored well-established, reliable resources, including government data and analyses that were contained in his considered materials, and instead created, through Dr. Jobes, convoluted theories and calculations to fabricate a waste comparison analysis to support his opinions. There was no need for Dr. Clay (and Dr. Jobes) to invent and apply novel theories and methodologies when reliable data on these topics is reported in scientifically accepted publications, such as the Agricultural Handbook, the ASABE standards and the 2002 Agricultural Census. The methodologies and theories employed by Dr. Clay are unsupported by published literature and the norms in the field, and have resulted in his opinions being biased and inaccurate.

WHEREFORE, in light of the foregoing, this Court should enter an order in limine precluding the expert testimony of Defendants' witness Billy Clay in its entirety.

Respectfully Submitted,

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